(20)

IN THE

Supreme Court of the United States

No. 553 October Term, 1944.

M. E. BLATT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, M. E. Blatt Company, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The first question involved in this proceeding is whether the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151, referred to herein as "the Act") applies to a local retail department store.

The second question is whether an employer is prohibited under the Act from posting a notice (side by side with the notice required by the National Labor Relations Board) advising the employees that they may join any

Union they wish to join and that membership will not affect their positions and further that it is not necessary for them to join, since no law requires them to do so; and calling attention to twenty-five years happy relationship of confidence and understanding.

The third question involved is whether an employer, in addition to being required to withhold recognition, may be ordered to "disestablish" an unaffiliated Association where it has not been found that he controls it but that only he was unneutral as between it and another Union.

On July 31, 1941 the National Labor Relations Board filed its complaint against the Employer Petitioner (R. 87) charging it with certain alleged unfair labor practices and alleging that the Employer was engaged in interstate commerce within the meaning of the Act. An answer was filed denying all charges and jurisdiction (R. 91).

On June 11, 1942 the Board filed a Complaint (R. 279) against the Employer again charging that it was engaged in interstate commerce and that it had committed unfair labor practices in posting notices and in dominating and interfering with the formation of an unaffiliated Association. The Answer of the Employer (R. 286) again denied that it is engaged in interstate commerce within the meaning of the Act and denied the charges.

In its findings of fact, the National Labor Relations Board (herein called "the Board") (R. 97) describes the Respondent as having its principal office and place of business in Atlantic City, New Jersey, where it conducts a retail department store business for the "purchase, sale, and distribution of general merchandise, including household furnishings and equipment, wearing apparel, notions, cosmetics, and other commodities. During 1941, the Respondent's wholesale purchases of merchandise for the operation of its business totalled $1,530,842. Approximately ninety-five per cent of such merchandise was acquired by and shipped to the Respondent from points outside the State of New Jersey. In this period, the Respondent's

gross sales amounted to $2,332,292. Included in these sales was merchandise in the amount of $16,326, which was shipped by the Respondent to points outside the State of New Jersey." The percentage of total sales so shipped out of New Jersey is about 0.7 of 1 per cent. For the year 1940 the Board had also found figures of such out of State deliveries amounting to 0.7 of 1 per cent. of the total sales (R. 4)

Long after the decision and order of the Board which was filed February 14, 1942 (R. 2) and considerably after the decision and order filed February 26, 1943 (R. 95), namely, on October 7, 1943, the Board filed its Petitions in the Circuit Court of Appeals for the Third Circuit for enforcement of those Orders (copies included in the certified record and proceedings were numbered 8493 and 8494). The Employer Petitioner filed Answers denying that it was engaged in commerce within the meaning of the Act and otherwise denying the charges.

The Court, in an opinion filed June 9, 1944 by Circuit Court Judge Biggs, held that the Employer was subject to the Act; that thereunder the Employer was prohibited from posting the notices referred to above and that the Employer was to "disestablish" the Association.

The Court states in its opinion:

> "The respondent contends that it is not subject to the Act because whatever goods are shipped to it for retail sale come to 'complete rest' and cease being in the stream of interstate commerce upon delivery to it. We dealt with a substantially similar contention in *National Labor Relations Board v. Poultrymen's Service Corporation*, 138 F. (2d) 204 and found it to be without merit. We adhere now to this ruling."

On July 5, 1944 a final decree was entered by the Court in accordance with the opinion.

B. STATEMENT DISCLOSING BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE DECREE OF THE CIRCUIT COURT OF APPEALS.

(a) This Honorable Court has jurisdiction to review the decree of the Circuit Court of Appeals in this case under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a); under Section 10 (e) of the National Labor Relations Act as amended (Act of July 5, 1935, C. 372; 49 Stat. 453; 29 U. S. C. A. 160); and under Rule 38, Sect. 5, subsection (b) of this Court.

(b) The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935, C. 372; 49 Stat. 449; amended June 25, 1936, C. 804; 49 Stat. 1921; 29 U. S. C. A. 151, etc.) the pertinent excerpts from which are set forth in the appendix annexed hereto.

(c) The Decree of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, was entered on July 5, 1944 and was final in form and effect. Petitioner has filed a motion to stay the enforcement of the Decree upon which an Order was entered staying the same for the period in which a Petition for Certiorari could be filed.

C. QUESTIONS PRESENTED.

The principal questions presented are:

(a) Where an Act defines "commerce" as meaning trade, traffic, transportation or communication among the several States, and defines "affecting commerce" as in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, and authorizes the Board to prevent any person from engaging in any unfair labor practice "affecting commerce", was it intended to include within

the terms "commerce" or "affecting commerce", the operation of a local retail establishment known as a department store which, over the counter, sells goods which have come to rest on its shelves?

The Circuit Court held that such an operation is covered by the Act.

(b) Is it an unfair labor practice within that Act (where the Board has ordered the employer to post a notice, notifying the employees that they are free to join a labor organization and that the Company will not discourage membership in a particular named Union or any other labor organization) for the employer to also, side by side, merely post a notice again stating that the right of an employee to join a Union is recognized and membership will not affect his position but that, on the other hand, it is not necessary for the employee to join any labor organization; and that no law requires him to do so; and calling attention to twenty-five years happy relationship of mutual confidence and understanding?

The Circuit Court held that it was an unfair labor practice for the Employer to post such a notice and that its prohibition did not improperly infringe upon the Employer's right of free speech.

(c) Can an Employer, found by the Board not to have disparaged the Union but only to have been unneutral in the membership campaign carried on by the Union and an unaffiliated Association, order the Employer, in addition to withholding recognition, to "disestablish" the Association where it is not found that the Employer controlled it?

The Circuit Court ordered the Employer to disestablish the Association.

D. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits, With Reference to the Interstate Commerce Question.

The Circuit Court, in its conclusion, differed with the opinions of other Circuit Courts as to the applicability of the Act to the business of a local merchant—even where the greater part of the merchandise stock in trade, before it came to rest in the store, originated outside of the State. *Consolidated Edison Co. v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, 393; affirmed 305 U. S. 197; 59 S. C. 206; 83 L. Ed. 126. *National Labor Relations Board v. White Swan Company*, CCA (4), 118 F. (2d) 1002. *Schroepfer v. A. S. Abell*, CCA (4), 138 F. (2d) 111.

II. The Circuit Court, With Reference to the Interstate Commerce Question, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by the Supreme Court.

This Honorable Court has already passed upon the constitutionality and the applicability of the Act in connection with production or actual transportation or other phases of economic processes prior to the time that goods come to rest, for the purpose of local sales, on the shelves of a local merchant. This case presents the question, which counsel believe has not been definitely and finally passed upon by this Honorable Court, as to whether the ordinary local over the counter sales of a merchant in a local store establishment, having no branches or selling outlets in other States, and not being a mail order house, is controlled by the Act. On principle, the question should be the same whether it applies to a small corner cigar store or a neighboring large department store. The point to be determined is whether or not there is not a legal and economic difference between a business engaging entirely in local intra-

state distribution of goods over its counter and the other economic phases of production and distribution prior to the time that the goods reach the store of the local merchant. Counsel are of the opinion that it has generally been understood that the local retail store selling over the counter is a business whose labor relations are subject to State control and not Federal control and that its operations do not constitute interstate commerce or acts affecting the same either within the terms of the Act or the Constitution.

Obviously this question is a very important one because it affects a very large number of businesses and a large segment of the ecnomic structure.

III. The Circuit Court, With Reference to the Interstate Commerce Question, Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of this Honorable Court.

In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 81 L. Ed. 893, 914, 57 S. C. 615, in which the Supreme Court upheld the constitutionality of the Act, the Court clearly and definitely stated that there was no question but that the commerce contemplated by the Act is "interstate and foreign commerce in a constitutional sense."

Also *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 146, 81 L. Ed. 965, 969, 57 S. C. 648.

Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, 460, 82 L. Ed. 954, 957, 58 S. C. 656.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 83 L. Ed. 1015, 59 S. C. 668.

And many other decisions of the Supreme Court on other interpretations of interstate commerce which are supposed to have set the limits which it is respectfully submitted the decision of the Circuit Court has exceeded.

Schechter v. United States, 295 U. S. 495, 55 S. C. 837.

Carter v. Carter Coal Co., 298 U. S. 238, 56 S. C. 855.

Federal Trade Commission v. Bunte Bros., Inc., 312 U. S. 349, 355, 85 L. Ed. 881, 885, 61 S. C. 580.

Walling v. Jacksonville Paper Co., 317 U. S. 564, 570, 87 L. Ed. 460, 467, 63 S. C. 332.

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. C. 40.

IV. Importance of the Questions Involved.

The settlement of the issues raised herein is of great public importance because they apply to a very numerous group of businesses, namely, the thousands of local retail establishments throughout the country and affect controversies which have arisen and will arise time after time under the Act. The interstate commerce question is one which will determine whether or not the Act is to cover practically every business or whether it was intended to cover only those businesses whose operations come within the limits of what has ordinarily been recognized as interstate commerce or as directly and immediately affecting interstate commerce. Under modern conditions it is very difficult to imagine a store, be it large or small, whose goods, in a substantial part, did not originate in some other State. It is felt that the origin of the goods and transportation and distribution before coming to rest upon the shelves of the retail storekeeper, are things apart from the operations of the storekeeper; so that his sales over the counter do not constitute interstate commerce or acts affecting interstate commerce. Until this question is finally and conclusively decided confusion in the minds of the Bar and Courts will continue.

V. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits With Reference to the Right of Free Speech of the Employer.

The Petitioner respectfully claims the privilege of its constitutional right of free speech. The Act neither was intended to, nor could it, make it unlawful for it to express its opinion to its employees to the effect that they might join any Union they want to and it would not affect their positions but that, on the other hand, they did not have to join any Union or pay dues; and further that for twenty-five years there had been a happy relationship of mutual confidence. This statement (R. 99) and a subsequent notice (R. 105) (shorter but to the same effect) were not accompanied by any threats by the Employer. Nor were there any unfair labor practices at or about the time the notices were posted, except the alleged preference of the Employer for the Association over the Union. Indeed, the Board itself has found that the Petitioner did not engage in disparaging the Union or in surveillance of Union members or leaders or indiscriminatorily transferring any employees (R. 118 and 114). Assuming what the Petitioner denied and still denies, that it was not neutral as between the Association and the Union, nevertheless, that alleged unneutrality unaccompanied by any threats or any discriminatory actions against the employees with respect to their positions or wages, could not constitute the element which deprived the Petitioner of its right to express its opinion as to the legal rights of its employees.

To put it otherwise, the Petitioner respectfully contends that even if it did show a preference for the Association (which it denies), and even if its notices did favor the Association (which it denies because they specifically state that the employees do not have to join any labor organization at all), nevertheless it had the right to express those opinions as long as it did not accompany them with threats or other intimidating influences. If, as the Circuit Court states, the notices constituted a campaign appeal directed

toward defeating the efforts of the Union, the Petitioner, while it does not admit that it engaged in any such campaign, feels that it had the right to do so as long as it was a campaign of advice only and not one linked with threats or intimidation. The Petitioner also justifies the notices by the fact that the notice dictated by the Board which the petitioner had to post and did post (R. 98) was so phrased as obviously to constitute a stimulus upon the employees not only to join a Union but to join a particular named Union.

Various Circuit Courts in other Circuits have held that employers have the right to make such statements and post such notices.

In the Sixth Circuit, the case of *National Labor Relations Board v. Ford Motor Co.*, CCA (6), 114 F. (2d) 905, Cert. den. 312 U. S. 689, 61 S. C. 621, 85 L. Ed. 1126.

In the Second Circuit, the case of *National Labor Relations Board v. American Tube Bending Co.*, CCA (2), 134 F. (2d) 993, Cert. den. 320 U. S. 768, 88 L. Ed. 41, 64 S. C. 84.

In the Fifth Circuit, the case of *National Labor Relations Board v. Brown Paper Mill Co.*, CCA (5), 108 F. (2d) 867, Cert. den. 310 U. S. 651, 84 L. Ed. 1416, 50 S. C. 1104.

In the Ninth Circuit, the case of *National Labor Relations Board v. Union Pacific Stages*, CCA (9), 99 F. (2d) 153.

In the Seventh Circuit, the case of *National Labor Relations Board v. Gutmann & Co.*, CCA (7), 121 F. (2d) 756.

VI. The Circuit Court, on the Question of Free Speech, Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be Settled.

Free speech under the Constitution is one of the fundamental rights. As such it should not be permitted directly or indirectly to be limited or whittled away. The subject itself readily indicates the weight of its national significance. Similar cases in labor matters under the Act are constantly arising. The matter is in a state of doubt and a precious right is at stake.

VII. The Circuit Court, on the Question of Free Speech, Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court.

It was felt that this Honorable Court in *Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, had clearly settled the question by upholding the employer's right of free speech as long as the words together with other acts or influences were not part of a general scheme to threaten and intimidate employees in their rights of collective bargaining. Although the learned Court below states that it is following the case of *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, it frankly admits, in its opinion, *that its interpretation thereof differs from that of the Circuit Court of the Second Circuit.* It erred in its construction of the *Virginia Electric & Power Co.* case, in that the Petitioner's notices were not accompanied by any intimidation and were not part of any implied threat. The learned Court below and the Board were both of the opinion that since they found the alleged unneutrality of the Employer between the Association and the Union showed a preference for the Association, the notices must be assumed to have been intended to further demonstrate that preference. What they overlooked was that the Petitioner under the *Virginia Electric & Power Co.* case had the right to indicate a preference as part of his right of free speech to express an opinion. Accordingly, it is respectfully submitted that the Circuit Court has decided the question in conflict with that applicable decision.

VIII. On the Question of Disestablishing the Association, the Circuit Court Has Rendered a Decision in Conflict With the Decisions in Other Circuits.

The conclusions of the Board do not show that the Petitioner controlled the Association. Its findings (R. 111) are that the Petitioner interfered with the formation and administration of the Association and contributed support to

it. These findings are based upon the notices and the disparate treatment alleged to have been accorded to the two organizations and the fact that, in the formation of the Association, some employees who had some minor supervisory status were participants. Whatever effect those factors may have upon the right of the Association to represent the employees, the fact is, that the Petitioner does not control the Association. It has been ordered not to recognize it. That is within its control. But it has also been ordered by the Decree of the Circuit Court and by the Board (R. 121) to completely disestablish the Association. A very pertinent fact is that the Petitioner never recognized the Association and has never had any dealings with it. It is impossible to understand, in view of that and in view of the Petitioner not being in control of the Association, how it can disestablish it or do any more than is already included in the negative order not to recognize it. The Ninth Circuit Court held, in the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, CCA (9), 134 F. (2d) 94, that it was improper for an employer to be ordered to disestablish an Association where he had never recognized it.

IX. Importance of the Questions Involved.

These issues are of great public importance not only because they involve the grave question of interference with free speech but also because that question and the question as to what an employer can be ordered to do with reference to unaffiliated associations, are constantly arising under the Act and will continue to do so. They are active troublesome issues in the domain of the Federal law which is prolific in its doubts and the amount of litigation arising and which will continue to arise thereunder.

X. Record Transmitted Herewith.

Your Petitioner presents to this Court herewith a duly certified transcript of the entire record in the case known as *National Labor Relations Board, Petitioner v. M. E.*

Blatt Company, Respondent, and numbered in the docket of the Circuit Court of Appeals for the Third Circuit 8493 and 8494, having been considered together in the Court below, which entered one decree. The matter originally arose before the National Labor Relations Board in two separate proceedings but the Circuit Court considered the two orders of the Board together, and entered one decree thereon.

Wherefore your Petitioner, on the averments herein contained and the references in the annexed brief in support of this Petition, respectfully prays that this Honorable Court issue, under the seal of this Court, a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Third Circuit, a certified full and complete transcript of the record of the proceedings in this cause being submitted herewith, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law; that the decree of the Circuit Court of Appeals may be reversed; and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated at Atlantic City, New Jersey, October 4, 1944, and filed on that date.

M. E. BLATT COMPANY,

By: HARRY CASSMAN,
Counsel.

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APPENDIX.

Excerpts from the National Labor Relations Act:

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by re-

storing equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the

National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a).

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a uit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: PROVIDED, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * *

Section 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in

any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency, conducting the hearing, or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, includ-

ing reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In support of the foregoing Petition for Certiorari, the following Brief is respectfully submitted:

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 143 Fed. (2d) 268 (Advance Sheets).

For ready reference, the decisions and orders of the National Labor Relations Board involved in the Court action (R. 2 and R. 95) will be found reported in XXXVIII N. L. R. B. 1210 and XLVII N. L. R. B. 1055.

BASIS OF JURISDICTION AND STATUTE INVOLVED.

Jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a); under Section 10 (e) of the National Labor Relations Act as amended (Act of July 5, 1935, C. 372; 49 Stat. 453; 29 U. S. C. A. 160); and under Rule 38, Sect. 5, subsection (b) of this Court.

The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935, C. 372; 49 Stat. 449; amended June 25, 1936, C. 804; 49 Stat. 1921; 29 U. S. C. A. 151, etc.) the pertinent excerpts from which are set forth in the appendix annexed to the Petition.

The decree of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, was entered on July 5, 1944 and was final in form and effect. Petitioner has filed a motion to stay the enforcement of the decree upon which an order was entered staying the same for the period in which a Petition for Certiorari could be filed.

STATEMENT OF THE CASE.

The first question involved in this proceeding is whether the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151, referred to herein as "the Act") applies to a local retail department store.

The second question is whether an employer is prohibited under the Act from posting a notice in connection with the notice required by the National Labor Relations Board, advising the employees that they may join any Union they wish to join and that membership will not affect their positions and further that it is not necessary for them to join, since no law requires them to do so; and calling attention to twenty-five years happy relationship of confidence and understanding.

The third question involved is whether an employer, in addition to being required to withhold recognition, may be ordered to "disestablish" an unaffiliated Association where it has not been found that he controls or dominates it but that only he aided it and was unneutral as between it and another Union.

On July 31, 1941 the National Labor Relations Board filed its complaint against the Employer, Petitioner (R. 87) charging it with certain alleged unfair labor practices and alleging that the Employer was engaged in interstate commerce within the meaning of the Act.

On June 11, 1942 the Board filed a Complaint (R. 279) against the Employer again charging that it was engaged in interstate commerce and that it had committed unfair labor practices in posting notices and in dominating and interfering with the formation of an unaffiliated Association. The Answers of the Employer (R. 91 and R. 286) both denied that it is engaged in interstate commerce within the meaning of the Act and denied the charges.

In its findings of fact, the National Labor Relations Board (herein called "the Board") (R. 97) describes the Respondent as having its principal office and place of business in Atlantic City, New Jersey, where it conducts a re-

tail department store business for the "purchase, sale, and distribution of general merchandise, including household furnishings and equipment, wearing apparel, notions, cosmetics, and other commodities. During 1941, the Respondent's wholesale purchases of merchandise for the operation of its business totalled $1,530,842. Approximately ninety-five per cent of such merchandise was acquired by and shipped to the Respondent from points outside the State of New Jersey. In this period, the Respondent's gross sales amounted to $2,332,292. Included in these sales was merchandise in the amount of $16,326, which was shipped by the Respondent to points outside the State of New Jersey." The percentage of total sales so shipped out of New Jersey is 0.7 of 1 per cent. For the year 1940 the Board had found figures for such out of State deliveries amounting to 0.7 of 1 per cent. of the total sales (R. 4).

Long after the decision and order of the Board which was filed February 14, 1942 (R. 2), and considerably after the decision and order filed February 26, 1943 (R. 95), namely, on October 7, 1943, the Board filed its Petitions in the Circuit Court of Appeals for the Third Circuit for enforcement of those Orders. The Employer, Petitioner, filed Answers denying that it was engaged in commerce within the meaning of the Act and otherwise denying the charges.

The Court, in an opinion filed June 9, 1944, by Circuit Court Judge Biggs, held that the Employer was subject to the Act and that thereunder the Employer was prohibited from posting the notices referred to above and found that the Employer was to "disestablish" the Association.

The Court states in its opinion:

> "The respondent contends that it is not subject to the Act because whatever goods are shipped to it for retail sale come to 'complete rest' and cease being in the stream of interstate commerce upon delivery to it. We dealt with a substantially similar contention in *National Labor Relations Board v. Poultrymen's Serv-*

ice Corporation, 138 F. (2d) 204, and found it to be without merit. We adhere now to this ruling."

On July 5, 1944, a final decree was entered by the Court in accordance with the opinion.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that a local retail department store, conducting over the counter sales, of goods on its shelves, wholly within the confines of one City and one State, is nevertheless subject to the provisions of the National Labor Relations Act, either as being engaged in interstate commerce or in activities substantially affecting interstate commerce or burdening or obstructing the same or the free flow thereof.

2. In holding that the local character of such retail store is affected for the purpose of the application of the Act, by the fact that the greater portion of the goods on its shelves originally were purchased by it from sources outside of the State.

3. In holding that an employer is prevented by the Act from posting notices to employees calling their attention to their legal rights with reference to joining or not joining a Union.

4. In holding that an employer, in addition to being ordered to withhold recognition, can be ordered to disestablish an Association which he never recognized, never dealt with and which he does not control.

ARGUMENT.

A. The Interstate Commerce Question.

The decision to the effect that the Petitioner's business, consisting of one retail store in Atlantic City, New Jersey, is subject to the Act, would logically mean that practically every retail store, be it large or small—in every hamlet and on every by-road—is subject to Federal control. This would result from the contention that Congress, by using in its legislation, the words "interstate commerce" or "affecting or burdening or obstructing or interfering with the free flow of interstate commerce" could control what has been assumed to be a purely local intrastate operation. This would all result from the contention that the fact that the goods sold and delivered locally were originally produced in another State or were purchased by the retail dealer in another State before he placed them upon his shelves.

It is the conclusion of the Circuit Court in this case, based upon its prior decision in *National Labor Relations Board v. Poultrymen's Service Corporation*, 138 F. (2d) 204, and other decisions by the same Court referred to in its opinion, that that factor is sufficient to bring the retailer within the control of the Act.

I. In so Deciding the Circuit Court Appears to be in Conflict With the Holdings of Other Circuit Courts of Appeals.

In *Consolidated Edison Company v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, 393, affirmed 305 U. S. 197, 83 L. Ed. 126, 59 S. C. 206, the Circuit Court of the Second Circuit states:

> "Consistently with these principles it can scarcely be doubted that the *labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are*

> *engaged in interstate commerce.* In such a case the closing of the merchant's store by a strike of his employees would undoubtedly affect interstate commerce, but *the effects would be too remote and indirect to bring his activities within the range of federal regulation.* * * *" (Emphasis supplied.)

The Circuit Court for the Fourth Circuit, in the case of *National Labor Relations Board v. White Swan Company*, CCA (4) 118 F. (2d) 1002, in dealing with the operation of a laundry in Wheeling, West Virginia, states in part:

> "While certain of its supplies are obtained from without the state, the volume of the interstate business thus involved is not sufficient, in our opinion, to bring the business within the jurisdiction of the Board. The record shows that these supplies consist of soap, bluing, bleach, solvent, coal, water, paper, tape and padding, and that respondent's purchases thereof during 1938 amounted to $38,333.15, of which $10,810.90 came from without the state. Respondent, however, operates delivery trucks in Ohio as well as in West Virginia, three of the delivery routes from its plants being in Ohio and eleven in West Virginia. The business involved is necessarily of a purely local character, as the record shows that a radius of fifteen miles is the practical limit for a laundry or dry cleaning business in this territory. The fact that business is done in Ohio, outside the state in which respondent's laundry is located, results from the fact that this purely local business is located in a city on a state line. Respondent transports garments in its trucks from those of its customers who reside in Ohio to its plant in West Virginia to be serviced, and then after servicing returns the garments in its trucks to the customers."

The same Circuit Court in the case of *Schroepfer v. A. S. Abell*, CCA (4), 138 F. (2d) 111, also stated more recently:

"A sausage manufacturer who sells his product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate sales *merely because he purchases the materials that go into the sausages in interstate commerce.*

"The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce." (Emphasis supplied.)

In the case of *Jax Beer Co. v. Redfern*, CCA (5), 124 F. (2d) 172, the Circuit Court for the Fifth Circuit held that the local sale of beer is intrastate commerce even though the beer was received from without the State and stored in a warehouse.

It has frequently been held that ordinary retail businesses are not in interstate commerce and are not engaged in activities which affect interstate commerce.

The Circuit Court for the Sixth Circuit in *Allesandro v. C. F. Smith Company*, CCA (6), 136 F. (2d) 75, in an action involving a chain of grocery stores within the State of Michigan, held that it was not engaged in interstate commerce and stated:

"The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail.

"* * * The Smith business is a retail business, its goods are acquired by a local merchant for local disposition and differ not at all from those of the corner grocery except in volume and perhaps in selling price."

In *Walling v. Mutual Wholesale Food & Supply Co.*, CCA (8), 141 F. (2d) 331 (Syllabus 16), the Court rejects the principle that goods bought interstate for resale intrastate gives the resale an interstate commerce character.

The Circuit Court of Appeals for the Seventh Circuit in *Walling v. Goldblatt Bros., Inc.*, CCA (7), 128 F. (2d) 778 (Cert. den.), 318 U. S. 757, 87 L. Ed. 1130, 63 S. C. 528, in a case involving the operation of several department stores and warehouses, *operating in two States*, the Court said:

> "Here, once the goods reached the warehouses, they assumed a wholly local character. The function of the warehouses was to furnish activities and means for the conduct of a relatively local retail business conducted by one company. This function was that of an ordinary warehouse for a retail establishment and bears no resemblance to a 'throat' or a 'current of commerce.' Upon delivery to the warehouse, interstate commerce ceased. Schechter Corp. v. United States, 295 U. S. 495; Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964; Winslow v. Federal Trade Commission, 277 Fed. 206, 209 (C. C. A. 4), cert. denied 258 U. S. 618; Atlantic C. L. R. R. v. Standard Oil Co., 275 U. S. 257, 267.
>
> "Where orders are solicited within a state and the goods are shipped from without the state directly to the customer or to an agent for delivery to the customer the transactions are a part of interstate commerce until the goods reach the customer. Jewel Tea Co. v. Williams, 118 F. (2d) 202, 206 (C. C. A. 10), and cases there cited; Binderup v. Pathe Exchange, Inc., 263 U. S. 291; Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U. S. 52. But here there were no such prior orders. * * * The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce. Jewel Tea Co. v. Williams, 118 F. (2d) 202, 207 (C. C. A. 10), and cases there cited; Lipson v. Socony Vacuum, 87 F. (2d) 265, 267 (C. C. A. 5). Where goods are delivered to the buyer to be sold

later and delivered to intrastate buyers subsequent acts are not commerce. Jax Beer Co. v. Redfern, 124 F. (2d) 172, 174 (C. C. A. 5); Swift & Co. v. Wilkerson, 124 F. (2d) 176 (C. C. A. 5); Jewel Tea Co. v. Williams, 118 F. (2d) 202 (C. C. A. 10); Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 689; Klotz v. Ippolito, 40 F. Supp. 422; Foster v. National Biscuit Co., 31 F. Supp. 552; Lipson v. Socony Vacuum, 87 F. (2d) 265 (C. C. A. 3); Atlantic Coastline R. R. v. Standard Oil, 275 U. S. 257; Winslow v. Federal Trade Commission, 277 Fed. 206; Fleming v. Arsenal Bldg. Co., 38 F. Supp. 207; Rauhoff v. Gramling & Co., 42 F. Supp. 754."

To the same effect is the case in the Tenth Circuit of *Jewel Tea Co. v. Williams*, CCA (10), 118 F. (2d) 202, and the case in the First Circuit of *Lipson v. Socony Vacuum Corp.*, CCA (1), 87 F. (2d) 265.

II. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been Settled But Should Be Settled by the Supreme Court.

The countless cases in which the Act would apply if the order of the Court below is allowed to stand and the national interest therein and sweeping effect thereof has already been pointed out in the Petition and in this Brief, and it is felt that no further elaboration is needed.

III. The Circuit Court Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of the Supreme Court.

It is the Petitioner's contention that the Circuit Court's order and the reasons given in its opinion, based upon the prior decisions by the same Circuit Court, are contrary to the established legal principles heretofore enunciated by this Honorable Court, not only under cases involving the Act, but under various other Statutes and

constructions of the interstate commerce clause of the Constitution.

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893, 57 S. C. 615, this Court passed upon the constitutionality of the Act. It used very significant language to show that the Act was limited in its scope to the domain of interstate commerce and of matters affecting it and it therefore was not intended by Congress to break those bounds. On that ground it was held constitutional. Its language is as follows:

> "* * * The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of a State. That *distinction* between *what is national* and *what is local* in the activities of commerce is vital to the maintenance of our Federal system. * * *
>
> "*The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers.* Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. * * *
>
> "Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Again, in *Washington, Virginia & Maryland Coach Company v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. C. 648, this Court stated:

> "The contention that the act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, is plainly untenable. As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power."

In *Consolidated Edison Company v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, affirmed 305 U. S. 197, 83 L. Ed. 126, 59 S. C. 206, the Circuit Court stated:

> "It can scarcely be doubted that the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside of the State, or some of his local customers are engaged in interstate commerce."

In affirming, the Supreme Court stated:

> "In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies, of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas."

In an earlier case, *Hopkins v. United States*, 171 U. S. 678, 43 L. Ed. 290, 19 S. C. 40, the question was whether the commission merchants on the Kansas City livestock market were subject to the Federal Anti-Trust Act. This Court stated:

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the

sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affects interstate commerce at all, does so only in an indirect and incidental manner?

"* * * *The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories.* * * *

"The character of the business of defendants must, in this case, be determined by the facts occurring at that city." (Emphasis supplied.)

Various decisions by this Court have indicated that the fact that a local dealer or retailer acquires his stock from out of the State does not render his retail business, an operation engaged in interstate commerce. In addition to the above cases, see *Walling v. Jacksonville Paper Company,* 317 U. S. 564, 87 L. Ed. 460, 63 S. C. 332, wherein the Court states:

"Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the act solely because it makes its purchases interstate."

In the case of *A. L. A. Schechter Poultry Corporation v. United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. C. 837, passing upon the constitutionality of the National Recovery Act, which by its terms applied to all transactions "affecting interstate or foreign commerce", this Court held that the operation of a poultry slaughtering and selling business in Brooklyn did not bring the employees within the Act or the sales within interstate commerce but that all of those transactions were merely local matters, whether or not the poultry originated in another State. This Court stated:

"The mere fact that there may be a constant flow of commodities into a State does not mean that the flow

continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. *It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States.* * * *" (Emphasis supplied.)

And, in discussing the effect of the operations upon interstate commerce, this Court said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. * * *

"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. * * *

But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among several States' and the internal concerns of a State. * * *"

In his concurring opinion, Mr. Justice Cardozo stated:

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not

become interstate and national because of distant repercussions. * * *

"To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system."

When we come to consider activities in the light of their effect on interstate commerce, it is clear that they must be *direct, immediate* and *substantial.*

In *Santa Cruz Fruit Packing Company v. National Labor Relations Board,* 303 U. S. 453, 466, 82 L. Ed. 954, 58 S. C. 656, this Court stated:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* * * * 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' "

In *McLeod v. Threlkeld,* 319 U. S. 491, 87 L. Ed. 1538, 63 S. C. 1248, this Court, through Mr. Justice Reed, made this significant comment:

"So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, *while those employees who handle goods after acquisition by a merchant for general local disposition are not.* (Emphasis supplied.)

IV. Application of Maxim De Minimis to the Insignificant Sales Resulting in Delivery to Other States.

Neither the Board nor the Court below seem to have relied upon the comparatively few deliveries to other States and therefore no extended argument will be made. The undisputed facts as found by the Board itself (R. 4 and R.

97) are that the percentage of sales resulting in shipment out of the State of New Jersey is 0.7 of 1% of the total sales in dollars and cents. Obviously this slight percentage should, for the purposes of this case, be entirely disregarded on the principle of de minimis and the case considered as though no deliveries were made out of New Jersey.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. C. 668, 83 L. Ed. 1014, wherein this Court specifically indicated (Syllabus 9) that the maxim de minimis would apply to the Act. Obviously the Petitioner's business was not to ship out of the State and the few sales that were made for that purpose were most likely made to a person locally who desired a gift sent to some one or possibly as a result of incidental replacement or duplication of a prior purchase.

B. 1. The Decision of the Circuit Court of Appeals Holding That the Petitioner Committed an Unfair Labor Practice in Posting the Additional Notices is in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Subject.

Outside of the question as to whether or not the Association was dominated or aided by the Employer Petitioner, (which question is not before this Court) although vigorously disputed both by the Petitioner and the Association itself, in the Court below, the question that remains is whether the Petitioner committed an unfair labor practice in posting the two notices, in connection with and alongside of the notice which the Board stipulated to be posted and which was posted.

The facts concerning those notices which were found by the Board and on the basis of which the matter was argued in the Court below, are set forth in the Decision and Order of the Board, Case No. C-2371 (R. 95) and appears thereafter (R. 98) as follows:

> "On March 18, 1942, the respondent posted two notices, side by side, on the bulletin board of the store.

One of the notices appeared to be in substantial compliance with the terms of the Board's order."
This notice read in full as follows:

"Notice to Employees

"This Company will not in any manner interfere, restrain or coerce its employees in the exercise of right of self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other manual (sic) aid or protection, as guaranteed by Section 7 of the National Labor Relations Act, nor will this Company discourage membership in Retail Clerks International Protective Association Local No. 1358, affiliated with the American Federation of Labor, or any other labor organization of its employees by discriminating in regard to hire and tenure of employment or term or condition thereof.

"This Company has offered immediate and full reinstatement, to their former or substantially equivalent positions, to employees alleged to have been discriminatorily discharged, without prejudice to their seniority and other rights and privileges, and have made payment of the wages each of them would normally have earned from the date of the discharge to the date of the offer of reinstatement less his or her net earnings during that period.

M. E. Blatt Co."

The other read in full as follows:

"To the Employees of the Company:

"Due to recent rulings regarding the National Labor Relations Act, employees may be approached by representatives of one or more labor organizations to solicit their membership. Under these circumstances, we feel that our employees have a right to a statement of our attitude with reference to this matter.

"We recognize the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires, or is intended to compel, you to pay dues to any organization.

"For the last twenty-five years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other. Employees may continue to deal directly with us or with the head of their respective department as they have in the past regarding matters affecting their interests. We believe that our interests in this business are mutual and can best be promoted through confidence and cooperation.

M. E. BLATT COMPANY"

and (R. 105) as follows:

"Sometime on April 3, the respondent posted the following notice:

"TO OUR EMPLOYEES:

"It has come to our attention that a group of our employees have met to form an organization for the purppose of collective bargaining and we wish to repeat that it is not necessary for any employee to join any organization or to pay dues to any organization in order to continue in our employ.

M. E. BLATT CO."

It was the theory of the Board followed by the Circuit Court that the latter two notices, notwithstanding that they were posted side by side with a notice designated by the Board, constituted an unfair labor practice because it was (R. 100) "A campaign appeal by the Respondent toward

defeating the efforts of the Union". Further (R. 100) the Board stated:

> "The fact that the notice, in part, also indicated that union membership would not jeopardize the job security of employees, and that the accompanying notice posted by direction of the Board declared, in addition, that the respondent would not interfere with the rights guaranteed employees in Section 7 of the Act, does not, in our view, alter the situation. Read together in the light most favorable to the respondent, the entire text of the two notices indicated that the respondent would not discriminate against employes because of union membership or interfere with their statutory right to self-organization, but antithetically imported, in addition, that the best interests of the employees would be served if they refrained from union organization. The respondent's emphasis upon direct dealing and the continuation of a past 'happy relationship' in which labor organizations played no part stood out in bold relief against, and in intention and effect substantially nullified, its simultaneous profession of recognition of the right of employees to organize. The employees were aware of the fact that just immediately prior to the posting of the notices the respondent, as found by the Board, had engaged in coercive and discriminatory activity against the Union, in violation of the Act. They knew, too, that the Union was then engaged in a campaign to secure their allegiance. In these circumstances, it cannot be supposed that the employees would overlook or pass off lightly any indication of the respondent's wishes.
>
> "In the context of all the circumstances set forth, this notice marked the respondent as a partisan candidate for the allegiance of the employees in opposition to the Union, and constituted a deliberate and forceful effort by the respondent to discourage its employees from membership and activity in the Union. We find,

as did the Trial Examiner, that by posting such a notice the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It should here be pointed out that the Board was in error of fact when it states that just immediately prior to the posting of the notices the Respondent had engaged in coercive and discriminatory activities. Except for the alleged acts which were claimed by the Board to indicate that the Employer preferred the Association to the Union, there were no acts of coercion or discrimination whatever at that time. For instance, the Board, in the same decision (R. 118) affirmatively found that the Employer had not disparaged the Union by engaging in surveillance of union members or leaders or discriminatorily transferred any employee from one position to another, and there is no contention even made by the Board that any one was then discharged.

If the Board was referring to the discharges in the earlier proceeding before it in Case No. C-1995 (Decision and Order, R. 2) it is pointed out that the alleged discharges which there took place were on December 24, 1940 and January 2, 1941 (R. 2). The notices now referred to were posted March 18, 1942 (R. 98) and April 3, 1942 (R. 105).

It cannot be said therefore that any coercive or discriminatory treatment was brought to bear upon any employees either at the time of the notices or for a very long time prior thereto. It is respectfully submitted that if, as is hereafter contended, the Employer had the right of free speech to express its views, merely to the effect that an employee did not have to join the Union in order to retain employment and that whether he did or didn't would not affect his employment—such right of free speech was not unalterably lost merely because over a year prior thereto the Employer was found to have improperly dismissed some employees.

The very same Circuit Court, in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, CCA (3), 142 F. (2d) 922, answered the same argument in the following manner:

> "The suggestion that we revisit the respondents with the conduct upon which the Board based its findings and order completely ignores the status created by the decree which is the fulcrum of the present proceeding. The Board, having used the Company's prior misconduct as the basis for the order, which the decree enforces, would now have us use the same conduct to give ulterior point to matters occurring since the Company's affirmative submission to the decree which matters, of themselves, are otherwise privileged. If that be permissible, then an employer, once a decree abating unfair labor practice is entered against him, can never again speak or write in expression of his views on labor problems without being hailed before the decreeing court for contempt."

In the case of *National Labor Relations Board v. Ford Motor Co.*, CCA (6), 114 F. (2d) 905, Cert. den. 312 U. S. 689, 61 S. C. 621, 85 L. Ed. 1126, the Court held that the employer had the right to make the statements which he did make derogatory to the Union, notwithstanding the fact that at or a short time prior thereto, the Court also found, unfair labor practices in the way of actual assault and other grievous coercion existed.

The whole question may be summed up in the Board's own view of the matter (R. 100) which was cited and sustained by the Court that the notices "constituted a campaign appeal by the Respondent directed toward defeating the efforts of the Union * * * in the context of all the circumstances set forth, this notice marked the Respondent as a partisan candidate for the allegiance of the employees in opposition to the Union, and constituted a deliberate and forceful effort by the Respondent to discourage its

employees from membership and activity in the Union. We find, as did the Trial Examiner, that by posting such a notice, the Respondent interfered with, instilled and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

What the Board and the Court below really decided was that the notices in themselves were improper and that an employer has no right, by oral or written word, to discourage membership in a Union or, as the Board stated, "to issue a campaign appeal directed toward defeating the efforts of the Union."

In this view it is respectfully submitted that the Court below is in error and that the Employer, if its decision should be sustained, will have suffered a serious interference with his right of free speech to express his opinions as to whether or not the employees either had to join the Union or whether it was best for them to join the Union.

A mere reading of the notices posted by the Employer, whether read separately or together, must lead to the unescapable conclusion that all that the Employer was doing was to remind the employees of the rights which they have at law, namely, to join or not to join the Union, and that their employment would not be affected, whichever way they decided. The reason that the Employer felt obliged to post the additional notices was that the original notice dictated by the Board seemed to overemphasize the right of the employee to join the Union and did not as strongly point out that he did not have to join the Union at all. Therefore, the matter resolves itself into the question as to whether or not the Employer did not have the right to remind the employees that, for a period of twenty-five years, the Company and the employees had had a happy relationship and that it was not necessary for them to join any labor organization, despite anything that they might be told to the contrary.

Holding that the Employer had no right to say that, the Circuit Court not only conflicted with other Circuits,

but clearly departed from its own decision and opinion filed shortly before that by Judge Jones in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, CCA (3), 142 F. (2d) 922, wherein the Court held that the Employer had the right to make the statements concerning the Union, stating therein (p. 926):

> "It can hardly be questioned that the constitutional guaranty protects the employer and the employee alike. Thus, to make known the facts of a labor dispute has been recognized as a constitutionally protected right of a member of a union. Senn v. Tile Layers Protective Union, 301 U. S. 468, 478, 57 S. Ct. 857, 81 L. Ed. 1229. And, in Misland Steel Products Co. v. National Labor Relations Board, 6 Cir., 113 F. 2d 800, 804, it was appropriately said that 'Unless the right of free speech is enjoyed by employers as well as by employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person.' Again, in National Labor Relations Board v. Lightner Pub. Corporation, 7 Cir., 113 F. 2d 621, 626, the court said that 'obviously the National Labor Relations Board has no authority to interfere with an employer's untrammeled expression of views on any subject.' Cf. National Labor Relations Board v. Sterling Electric Motors, Inc., 9 Cir., 109 F. (2d) 194, 204. For like reason, a court, in enforcing a Labor Board order, lacks any such authority. The decree, therefore, is not to be construed as requiring something which it is beyond our power to direct.
>
> "(5, 6) The Wagner Act does not purport to authorize a restraint upon freedom of speech in any circumstances. 'Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens (persons) by the First Amendment.' See National Labor Relations Board v.

Ford Motor Co., 6 Cir., 114 F. 2d 905, 914, certiorari denied 312 U. S. 689, 61 S. Ct. 621, 85 L. Ed. 1126. Had there been any such provision in the statute, it would have been invalid as in contravention of the First Amendment. Midland Steel Products Co. v. National Labor Relations Board, supra, 113 F. 2d at page 804; National Labor Relations Board v. Union Pacific Stages, Inc., 9 Cir., 99 F. 2d 153, 178. Accordingly, it is our opinion that it was not the intention of Congress in the Labor Act to forbid an employer from expressing opinions as to labor unions or as to anything else so long as his expressions do not constitute, or contribute to, acts or threats of discrimination, coercion, or intimidation in denial of his employees' free and untrammeled exercise of their rights as guaranteed by the Act. Cf. Jefferson Electric Co. v. National Labor Relations Board, 7 Cir., 102 F. 2d 949, 956, quoting from National Labor Relations Board v. Union Pacific Stages, loc. cit. supra."

The decision of the Court below is clearly in conflict with the case of *National Labor Relations Board v. American Tube Bending Co.*, CCA (2), 134 F. (2d) 993, Cert. den. 320 U. S. 768, 88 L. Ed. 41, 64 S. C. 84. In that case, the Court states that the statements there made by the Employer, which more obviously were a campaign appeal directed against the Union, did not constitute an unfair labor practice. Judge Hand, at p. 95, states:

"We shall not go over them in detail; they appear to us to be substantially the same in their general tenor and purport. The respondent professed itself willing to abide loyally by the results of the election, *but did not conceal, though perhaps it made some effort to disguise, its preference for no union whatever.* But there was no intimation of reprisal against those who thought otherwise; quite the opposite. The most that can be gathered from them was an argu-

ment, temperate in form, *that a union would be against the employees' interests as well as the employer's,* and that the continued prosperity of the company depended on going on as they had been. It seems to us extremely undesirable, particularly in so highly charged a subject matter, to draw fine-spun distinctions between two situations so closely alike; any we could make would be insubstantial refinements without real significance; would promote controversy and exacerbate, where the purpose should be to assuage. If there was a basis for finding that such a presentation of the employer's side might be a covert threat to recalcitrants, there was as much basis in the Virginia case. If on the other hand the employer's interest in free speech in the Virginia case was thought to outweigh an actual prejudice to the employees' right of collective bargaining, the employer's interest is the same in the case at bar and the employees' prejudice no greater." (Emphasis supplied.)

The Ninth Circuit Court of Appeals, in the case of *National Labor Relations Board v. Citizen-News Co.*, CCA (9), 134 F. (2d) 970, held that the making of a statement derogatory to a labor union for the purpose of preventing employees from joining it, was not an unfair labor practice, where the employer did not threaten or take action to prevent or coerce its employees, but on the contrary, stated that it would not interfere if employees wished to join the Union.

The fact that the decision of the lower Court is in conflict with the Second Circuit is expressly admitted in the opinion of the lower Court where the Court, in referring to the construction by Judge Hand of the Second Circuit, of the decision of this Court in *NLRB v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, states: "We do not so construe the Supreme Court's decision."

Other cases in which Circuit Courts have held that there was no violation of the Act by reason of the employer's statements or notices are:

Greif & Bros. v. National Labor Relations Board, CCA (4), 108 F. (2d) 551, in which an employer's expression of preference for an inside union was not held to be wrongful.

Diamond T Motor Car Co. v. National Labor Relations Board, CCA (7), 119 F. (2d) 978, where a speech, even if expressing a preference for a certain labor organization, was held not to amount to improper influence or coercion.

National Labor Relations Board v. Brown Paper Mill Co., CCA (5), 108 F. (2d) 867, Cert. denied 310 U. S. 651, 84 L. Ed. 1416, 50 S. C. 1104, where the fact appeared that the management stated that it preferred to deal with a local unaffiliated association.

Press Co. v. National Labor Relations Board, 73 App. D. C. 103, 118 F. (2d) 937, Cert. denied 313 U. S. 595, 85 L. Ed. 1548, 61 S. C. 1118, holding that anti-union statements by themselves did not constitute an unfair labor practice.

To the same effect are *National Labor Relations Board v. Union Pacific Stages,* CCA (9), 99 F. (2d) 153; *National Labor Relations Board v. Gutmann & Co.,* CCA (7), 121 F. (2d) 756, and *Midland Steel Products Co. v. National Labor Relations Board,* CCA (6), 113 F. (2d) 800.

B. 2. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With the Applicable Decisions of the Supreme Court.

This Court passed upon the question in the case of *National Labor Relations Board v. Virginia Electric & Power Company,* 314 U. S. 469, 86 L. Ed. 348, 62 S. C. 344. In that case the employer had a history of anti-union activity and it published a bulletin and an official made a speech which were claimed to be derogatory to the efforts of the Union to organization. The notice in that case is

somewhat similar to the notice in the case at bar. But in that case an official of employer also made a speech indicating that if the employees would set up an unaffiliated union it might make it easier to bargain. This Court held that there was no coercion merely through the words used in the speech or notice and that if the Board had based its action upon them alone, apart from the Company's dealings with its employees, it was in error. So isolated, the Court found it difficult to sustain a finding of coercion founded upon them (P. 479 of 314 U. S., P. 349 of 62 S. C.). Accordingly, the Court in that case held that in themselves the notice and speech were not improper. In our case there is likewise no evidence of coercion accompanying the notices. In fact the notices in our case do not constitute nearly as much of a campaign appeal against the Union as the notice did in, for instance, the *American Tube Manufacturing Co.* case, 134 F. (2d) 993, where Judge Hand found that on the basis of this Court's opinion in the *Virginia Electric & Power Co.* case the notice was not objectionable.

The notices used by the petitioner in this case were in no respect either derogatory to the Union or coercive in their effect. They were restrained advisory statements by the employer to his employees giving the employer's judgment as to what would be preferable and also what the rights of employees were. There was no effort to impose upon the judgment or decision of the employees and no twisting of the language can even produce any threat contained therein. Whether the notices constituted a campaign appeal or not, the Employer had the right to say therein what he did say. Otherwise, the result must be the Act precludes employers from exercising their constitutional right of free speech, especially in a case like this where there is nothing either erroneous or wrongful in what was said.

B. 3. The Question Presented Is of Great Public Importance.

The question is of importance, not only because it involves one of the fundamental constitutional rights, namely, that of free speech, but also because of the existing uncertainties, due largely to the conflicting Circuit Court opinions, as to whether or not an employer's freedom of expression was obliterated by the Act. The Employer in this case has had an order entered against him by the Circuit Court because, in a written statement, he reminded the employees of twenty-five years of peaceful relationship and that they were not required either to join or to refrain from joining a union, and that whichever way they chose, it would make no difference in their standing. It seems that it is of great moment for employers and indeed for the public as a whole to know whether or not such expression has become improper.

As counsel reads the opinion of this Court in the *Virginia Electric & Power Co.* case, such expression, unaccompanied by any threats or other coercion, is still not unlawful. However, due to the various interpretations of this Court's opinion, evidenced by the stated dissent in that respect of the Court below from the interpretation by the Circuit Court in the Second Circuit, it is respectfully submitted that the matter should be clarified. It is a question that has arisen frequently and will continue to arise hereafter and according to the present status of the decisions, employers in one Circuit are prohibited from ex pressing their opinions while similar opinions may be uttered in other Circuits.

C. In Addition to the Order to Withhold Recognition, It Was Improper to Order the Employer to Disestablish the Association, Which It Never Recognized, Never Dealt With and Did Not Control.

The conclusions of the Board affirmed by the Court below (R. 111) upon which the Association was condemned are based upon the alleged greater freedom allowed by the Employer to the organizers of the Association to obtain members than allowed to the organizers of the Union.

Secondly, it was alleged that employees who hold some supervisory capacity were active in the Association (R. 113); and

Third, that somehow or other the notices hereinbefore discussed favored the Association above the Union.

In short, all that was found was that between the two, the Employer was not neutral.

It is conceded by the Board (R. 104) that the Association was formed by a group of employees who retained independent counsel for that purpose (R. 103, 104). Nowhere in this record is there any evidence or finding that the Petitioner Employer actually controlled the Association.

Nevertheless, in its decree, the Circuit Court not only ordered the Petitioner to withhold recognition from the Association but also to "completely disestablish the Association." The Petitioner respectfully states that whatever "disestablish" may mean, it is in no position to handle, terminate or otherwise do anything with the Association. The decree already ordered it to withhold recognition. That it can do. The order to disestablish the Association must mean something more. That it cannot do. The Association was not condemned because the Petitioner controlled it. Accordingly, the Petitioner should not be ordered to do something which is beyond its means and for which order there is absolutely no justification in the record. As a matter of fact, unlike other cases, the Petitioner

here never recognized and has never even dealt with the Association. It is as much a stranger to it as to the Union and it is difficult to see how the Board imagines that the Employer can disestablish the Association any more than it could disestablish the Union.

In this respect the Order of the Court below is in conflict with the Ninth Circuit. In the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, CCA (9), 134 F. (2d) 94, the Board found that the employer had dominated an independent union and had even dealt with it; but its dealings had not gone so far as recognition. Accordingly, that Circuit Court held that the Board was wrong in ordering the Employer to disestablish the independent union.

There does not seem to be any decision by the Supreme Court on the subject and in view of the very many cases involving unions which are not to be recognized, it is respectfully represented that this Court should clarify the matter and decide whether the Board has the right to order an employer to do something which is apparently beyond its power.

CONCLUSION.

Accordingly we respectfully urge the Court to grant a Writ of Certiorari in this case. The decision of the lower Court is in conflict with the recent decisions of other Circuits in all phases of the matter herein discussed, namely, the question of jurisdiction, the right of free speech and on the order to disestablish the Association. The subjects are also such as have never been finally determined by this Court except as to the question of free speech; and the decision of this Court in that respect has been interpreted diversely by the different Circuits. The questions all relate to the Act which is an important piece of Federal legislation constantly being interpreted in the Courts. The rights and activities of innumerable persons,

both employers and employees, are governed thereby and the extent of those rights should be clearly adjudicated.

Dated at Atlantic City, New Jersey, October 4, 1944.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 553

M. E. BLATT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 371–385) is reported in 143 F. (2d) 268. The findings of fact, conclusions of law, and orders of the National Labor Relations Board (R. 2–17, 95–121) are reported in 38 N. L. R. B. 1210 and 47 N. L. R. B. 1055.

JURISDICTION

The decree of the court below (R. 385–387) was entered on July 5, 1944. The petition for a writ of certiorari was filed on October 4, 1944. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act is applicable to petitioner, which owns and operates a large department store in Atlantic City, New Jersey.

2. Whether certain anti-union notices posted by petitioner, which, in the context of other anti-union conduct, the Board found to be coercive, were privileged by virtue of the First Amendment.

3. Whether the Board may properly order petitioner to disestablish a labor organization which it has dominated and interfered with but not recognized.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix to the petition for certiorari (Pet. 14–19).

STATEMENT

Upon usual proceedings under Section 10 of the Act (R. 1; 85–94), the Board, on February 14, 1942, issued its findings of fact, conclusions of law and order in Case No. C–1995 (R. 2–17) (Case No. 8493 in the court below), and, on February 26, 1943, issued its findings of fact, conclu-

sions of law and order in Case No. C–2371 (R. 95–121) (Case No. 8494 in the court below).[1] The facts, as found by the Board and as shown by the evidence in these two proceedings may be summarized as follows:[2]

Petitioner, a New Jersey corporation, owns and operates a retail department store in Atlantic City, New Jersey, in which it employs approximately 300 persons. It annually purchases merchandise for resale valued in excess of $1,500,000, of which 95 percent is purchased in and shipped to petitioner from States other than New Jersey. Its annual gross sales of merchandise amount to more than $2,000,000, about $16,000 of which is shipped to points outside New Jersey. (R. 4, 97; 294, 122–123, 18–19.)

Organizational efforts among petitioner's employees began in December 1940 (R. 5; 21). On December 7, 1940, 8 or 10 of petitioner's employees attended a union meeting at which they selected 5 of their number to act as an organizing committee (R. 5; 23). A few days later, employee Flanagan, chairman of this committee, was approached by petitioner's general superintendent Rosenberg (R. 5; 75) who questioned him about the Union, whether he had joined it, whether he attended meetings, and what he expected to gain

[1] The Board corrected its order of February 26, 1943, by amendment on March 2, 1943 (R. 121).

[2] In the following statement, record references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

thereby (R. 5; 32–33). When Flanagan replied that he had joined the Union in order to obtain a wage increase, Rosenberg countered that he could achieve that goal without affiliating with the Union and offered to secure a promotion for him (R. 5; 32–33). About a week later, when Flanagan was observed conversing with a stranger, Rosenberg again approached him, demanded to know whether the stranger was "one of the union men" and interrogated Flanagan further with respect to his union affiliation (R. 5; 81, 33). About the same time, Supervisor Alkazin, head of the receiving department (R. 5; 30, 68, 69), questioned both Flanagan and employee Mooney, one of the members of the organizing committee (R. 11; 23), about their union activities and referred to the meeting of December 7 as the "Ku Klux Klan meeting" (R. 5–6, 11; 58–59, 69, 70–71, 34, 48, 42).

About December 18, the Union requested a collective bargaining conference (R. 6; 24). Petitioner ignored the request (R. 6; 24–25) and instead struck boldly to destroy the union movement in its incipient stage. On December 24, petitioner discharged four of the five members of the Union's organizing committee (R. 6–9, 11–13; 34–35, 50, 51, 58, 73–74). The fifth member, employee Reitzler, who was absent during this period because of illness (R. 9; 42) was discharged when she returned to work on January 2, 1941 (R. 9–10; 43).

Upon the foregoing findings, the Board, in Case No. C–1995, concluded that petitioner was subject to the Act; that by questioning employees concerning their union membership and activities, disparaging the Union and seeking to induce employees to relinquish membership therein petitioner had violated Section 8 (1) of the Act; and that by discharging the five members of the Union's organizing committee for the purpose of discouraging union membership and activities, petitioner had violated Section 8 (3) of the Act (R. 14–15). On February 18, 1942, the Board issued its order directing petitioner to reinstate the discharged employees with back pay, to cease and desist from its unfair labor practices and to post appropriate notices (R. 15–17).

On March 18, petitioner posted two notices on its bulletin board side by side (R. 98–99; 124, 194). The first appeared to be in substantial compliance with the terms of the Board's order (R. 98–99; 290, 16); the second, plainly intended to counteract the force of the first (R. 100–101), anticipated resumption of the Union's organizational efforts, "called upon the employees to continue to deal directly with [petitioner] in the future, as they had for 25 years in the past, without the intervention of labor organizations, and clearly implied that such intervention would constitute the antithesis of a relationship based upon mutual confidence and cooperation between [petitioner] and its employees" (R. 100; 291). Shortly

thereafter, petitioner reinstated and made whole the employees it had discriminatorily discharged (R. 98–99; 290, 124).

On March 26, after the reinstatement of employee Reitzler, union organizational efforts, which had ceased with the discharges, were resumed (R. 101–103; 124, 145, 149). Petitioner immediately retaliated by barring all union discussion on the premises, even on the employees' free time. Employee Witsky, who had obtained signatures to membership applications during working hours, was severely reprimanded by the head of her department, excused for a week from all duties which would take her into other parts of the store, and instructed to report to him whenever she wished to leave the department (R. 101–102; 129–131, 273–274). The next day, March 27, the head of the fountain department assembled his employees and instructed them not to discuss the Union during working hours (R. 102; 216–217). Department-head Price, upon observing employee Chazin, a known union adherent, in conversation with another employee before working hours, interrupted the conversation and ordered Miss Chazin to leave the department. When Miss Chazin reported the incident to petitioner's personnel director, she was told "We are stopping the girls from discussing the Union in the store" (R. 102–193; 181–183). On the following days, petitioner's department heads and supervisors continued their concerted attempts to prevent

known union adherents from discussing the Union with other employees (R. 107–108; 155, 158, 175, 177).

During this period, another labor organization, Organized Workers' Association of the M. E. Blatt Company (hereinafter referred to as the Association), appeared on the scene and was accorded markedly different treatment by the employer (R. 103–109, 111–114; 125). The Association's efforts to obtain a following by soliciting employees on company time within the store were not only countenanced by petitioner, but were actively aided and supported by its supervisory staff (*id*). Within the brief period of 8 days, from April 2 to April 9, the Association acquired a membership of more than 200 out of the 300 employees in the store (R. 108, 112; 125, 228, 259–261).

The Association held its first meeting on April 2 (R. 104, 112; 158, 228, 237). No circulars were issued, but notice of the meeting and its purpose was spread by word of mouth throughout the store (R. 104; 164, 228, 270–271) with such thoroughness that approximately 250 employees attended (R. 104; 135–136, 236). On the day following this meeting, petitioner posted another notice, which, as Silberman, petitioner's comptroller testified, and as the Board found, was directed not against the Association's campaign but against that of the Union (R. 105; 201–202). This notice read as follows (R. 291):

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TO OUR EMPLOYEES

> It has come to our attention that a group of our employees have met to form an organization for the purpose of collective bargaining and we wish to repeat that it is not necessary for any employee to join any organization or to pay dues to any organization in order to continue in our employ.
>
> M. E. BLATT CO.

On Saturday, April 4 (the day before Easter, an unusually busy day for any department store), and on Monday, April 6 (R. 105–106, 112; 157, 197, 169), the Association conducted an intensive organizing drive, soliciting memberships on nearly every floor of the store on company time, with petitioner's tacit approval (R. 105–108, 112–113; 132–133, 138, 143–144, 155–158, 160–161, 165–166, 169–170, 172–173, 179–181, 188–189, 199, 247–248, 250). In fact, Supervisors Cohen, Reger, and Creighton joined in the campaign (R. 106–107, 113; 143–144, 185, 169).[3] Miss Creighton told employee Watts that "she was surprised at her" because she was "the only girl in [Miss

[3] Cohen was in charge of the marking room in the receiving department (R. 106; 142–143, 148, 251–252, 253–254. Miss Creighton was an assistant to Mary Price, who supervised at least eight departments on the first floor (R. 106; 168–169, 173). Miss Creighton possessed authority to transfer employees from department to department, to sign credits and shopping passes, and to inform her supervisor of misbehavior or inefficiency of subordinates (R. 106; 267–269, 275). Miss Reger had direct charge of eight or nine girls in the auditing department (R. 106; 189, 208, 270–271).

Creighton's] department who belonged to the Union" and that "all the other girls" were joining the Association; she expressly advised Miss Watts to abandon the Union and join the Association instead (R. 106; 169). On another occasion, Miss Creighton was overheard to remark to Supervisor Reger, "When I get through talking to them there will be two members less for the A. F. of L." (R. 106; 185).[4]

On the evening of April 6, at a meeting which again was advertised by word of mouth throughout the store (R. 108; 164–165, 271–272, 226–227, 228, 229–230), a certificate of incorporation for the Association was executed (R. 108; 221–222, 243–244, 256, 296–297).[5] The following day a letter advising petitioner of the existence of the Association was circulated throughout the store for examination and signature (R. 108; 175–176, 230–231, 244–245). On April 9, 20 employees, including Cohen, gathered in the store to inspect a proposed Association constitution (R. 108–109; 161–163, 219–220, 222, 223–224, 239–242, 256–257, 264–265). Not once did petitioner attempt to

[4] Miss Reger, who had attended the Association's first meeting (R. 270–271), used no less effective methods to accomplish the same objective. In one instance, when union member Mrs. Witsky was being pressed by Association organizers to change sides, Miss Reger joined the group and reminded Mrs. Witsky of an occasion on which union membership had resulted in discharge (R. 136–137).

[5] One of the incorporators was Supervisor Cohen (R. 243, 297).

interfere with these activities (R. 112). Subsequently, Cohen was elected vice president of the Association and Supervisor Reger was elected recording secretary (R. 110, 113; 222, 238, 246). They thereby became *ex officio* members of the Association's board of directors, empowered under its constitution and by-laws to enter into negotiations with petitioner respecting terms and conditions of employment (R. 110; 246, 249, 298). On April 10, petitioner notified the Board that the Association had requested recognition as exclusive bargaining representative (R. 109; 302).

Upon the foregoing findings, the Board, in Case No. C–2371, concluded that petitioner's continued manifestations of hostility to the Union coupled with its support of the Association had deprived the employees of the full freedom of choice which the Act guarantees (R. 111). Viewing the notices posted by petitioner on March 18 and April 3 (pp. 5, 8, *supra*) in the total context of petitioner's discriminatory and coercive conduct, including its interference with the formation and administration of the Independent, the Board concluded that the notices, too, infringed the rights of the employees, and that by its entire course of conduct petitioner had violated Sections 8 (1) and (2) of the Act (R. 111–114). The Board ordered petitioner to cease and desist from its unfair labor practices, to withhold recognition from and completely disestablish the Association

and to post appropriate notices (R. 118–119, 121).

On October 7, 1943, the Board filed petitions in the court below to enforce its orders in both cases (R. 349–351, 356–359). On June 9, 1944, the court handed down a single opinion enforcing the Board's orders in full (R. 371–385). On July 5, 1944, a decree was entered in conformity with the opinion (R. 385–387).

ARGUMENT

1. Petitioner's contention (Pet. 6–8, 25–35) that although it annually sells and distributes merchandise valued at more than $1,500,000, 95 percent of which it receives through the usual channels of interstate commerce, it is nevertheless not subject to the Act, is, as the Board and the court below held unsound. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841, 843 (C. C. A. 4), modified in other respects, 308 U. S. 241; *J. L. Brandeis & Sons* v. *National Labor Relations Board,* 142 F. (2d) 977 (C. C. A. 8), certiorari denied, October 16, 1944, No. 385 this Term; *National Labor Relations Board* v. *J. L. Hudson Co.,* 135 F. (2d) 380 (C. C. A. 6), certiorari denied, 320 U. S. 740; *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 115 F. (2d) 414, 416 (C. C. A. 4), reversed and remanded on other grounds, 314 U. S. 469, 476; cf. *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297; *Dahnke-*

Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 290–291; *Wickard* v. *Filburn,* 317 U. S. 111, 125. Moreover, petitioner annually sells and ships merchandise valued at about $16,000 to out-of-State customers. The employer's petition for certiorari in the *J. L. Brandeis* case, *supra,* denied on October 16, 1944, was premised upon the identical considerations petitioner raises here. No questions of general importance are presented, and no conflict of decisions is shown.

2. Petitioner asserts (Pet. 9–11, 35–47) that the notices which it posted on March 18, 1942, and April 3, 1942, were constitutionally privileged and that the court below therefore erred in approving the Board's finding that the notices violated Section 8 (1) of the Act. This contention rests, however, upon an artificial abstraction of the notices from the entire background and complex of petitioner's activities in the light of which the notices were appraised by the Board and found to have coercive significance. The court below, as did the Board, expressly considered the notices, not merely in isolation, but "in the light of * * * [petitioner's] other acts in furtherance of the Association and in hindrance of the organization of the Union (R. 384, 381), and properly sustained the Board's conclusion.[6] *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 538–539; *National Labor*

[6] The court below found that the notice of March 18, standing alone, could not be deemed a violation of the Act, but

Relations Board v. *Trojan Powder Co.*, 135 F. (2d) 337, 339 (C. C. A. 3), certiorari denied, 320 U. S. 768; *Elastic Stop Nut Corp.* v. *National Labor Relations Board*, 142 F. (2d) 371 (C. C. A. 8), certiorari denied, October 9, 1944, No. 224 this Term; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. (2d) 761 (C. C. A. 7); *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770.

No conflict of decisions is presented, for in *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. (2d) 993 (C. C. A. 2), certiorari denied, 320 U. S. 768, upon which petitioner relies,[7] the record consisted of nothing but an employer's letter and speech delivered on the eve of an election, and the circuit court of appeals expressly

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was such a violation when considered in the entire context of petitioner's conduct (R. 383–384). The court regarded the notice of April 3 "to be objectionable in itself" but "particularly so" when considered in its entire context (R. 384).

[7] Except for *National Labor Relations Board* v. *Citizen-News Co.*, 134 F. (2d) 970 (C. C. A. 9), the other cases upon which petitioner relies (Pet. 10, 42, 44, 45) were either decided prior to *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, or arose in the same circuit as the instant case. In the *Citizen-News Co.* case, the Ninth Circuit viewed (134 F. (2d) at pp. 971–972) the Board's opinion with respect to the oral statements as resting entirely on the statements divorced from the other factors in the case. It felt bound, as did the Second Circuit in *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. (2d) 993, certiorari denied, 320 U. S. 768, by this Court's opinion in the *Virginia Electric case* (314 U. S. 469).

predicated its holding upon the absence of any setting of employer conduct in the light of which the Board could appraise the tendency of these utterances to affect the employees' freedom of choice (134 F. (2d) at p. 995). Thus, the court there recognized the principle enunciated by this Court (*National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477), and applied by the court below (R. 382), that "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act."

In this posture, contrary to petitioner's contention (Pet. 10–11, 45–47), the case at bar does not present an appropriate occasion to explore the basis of the holding in the first *Virginia Electric & Power* case (314 U. S. 469), as to which the court below (R. 382–383) deemed itself at variance with the Circuit Court of Appeals for the Second Circuit. In the *American Tube Bending* case, the Second Circuit expressed doubt whether the *Virginia Electric* case was remanded to the Board because the Company's claim of constitutional privilege was found meritorious or because the utterances, standing alone, were thought to constitute insufficient evidence to support the finding of coercion. While conceding that "it makes no difference which view we take," the Second Circuit intimated that it was inclined to the former view (134 F. (2d) at p. 995). The court below

attributed to the Second Circuit a third interpretation of the *Virginia Electric* case. It believed that the Second Circuit construed the *Virginia Electric* case to mean that with respect to speech not on its face coercive, the constitutional privilege is "absolute" (R. 383), by which we understand the court below to mean constitutionally privileged irrespective of other entangled circumstances. The Third Circuit expressed the view that the *Virginia Electric* case merely held that the utterances there considered were not, standing alone, coercive (R. 383). On the divergence in viewpoint between the Second and Third Circuits assumed by the court below, we would agree with the latter's viewpoint, but we do not so interpret the *American Tube Bending* opinion. The Second Circuit seems clearly to have considered the *Virginia Electric* utterances as constitutionally privileged only when standing alone, and not when regarded as parts of the whole complex of circumstances (134 F. (2d) at p. 995). We believe that nothing in the *American Tube Bending* decision would have precluded the Second Circuit from holding that the notices in the instant case considered in their whole setting violated the Act. And certainly there is no reason to believe that the Second Circuit would not have reached the same ultimate result, in view of the other acts of petitioner which constituted unfair labor practices, in sustaining the order based on violation of Section 8 (1) of the Act.

3. It is urged (Pet. 11–12, 48–49) that the Board erred in ordering petitioner "completely [to] disestablish the Association," although petitioner concedes that on the findings made the order requiring petitioner to withhold recognition from the Association is proper. The first argument advanced in support of this contention is that since petitioner did not "control" the Association, the Board is powerless to order its disestablishment. But the Board's findings that petitioner "dominated and interfered with the formation and administration of the Association and contributed support to it" within the meaning of Section 8 (2) of the Act, and that the Association was consequently "incapable of representing the employees for the purposes of collective bargaining" (R. 117) are entirely adequate to support the normal remedy of disestablishment, as the courts have uniformly held.[8] It is well settled that the continued existence of a labor organization found by the Board to have been

[8] A showing that an employer dominates the internal affairs of a labor organization, is not, contrary to petitioner's apparent belief, necessary to support an order of disestablishment. *National Labor Relations Board* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 247; *Reliance Manufacturing Co.* v. *National Labor Relations Board*, 125 F. (2d) 311, 314 (C. C. A. 7); *Roebling Employees Association* v. *National Labor Relations Board*, 120 F. (2d) 289, 295–296 (C. C. A. 3). In any event, as the facts set forth in the Statement show (*supra*, pp. 9–10), petitioner's representatives held controlling positions in the Association.

dominated and supported by an employer "thwarts the purposes of the Act." *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236.

Petitioner's assertion that the order is improper because petitioner is unable to comply with it is groundless. Having by its illegal interference and support established the Association as a barrier to the free exercise of its employees' rights to self-organization, petitioner cannot evade its obligation of "wiping the slate clean" *National Labor Relations Board* v. *Newport News Shipbuilding & Drydock Co.,* 308 U. S. 241, 250.

Finally, petitioner states that the Board was powerless to order disestablishment of the Association because petitioner has not recognized the Association as exclusive bargaining representative. Petitioner advances no reasons in support of this position but relies (Pet. 12, 49) solely upon the decision by a divided court in *National Labor Relations Board* v. *Germain Seed & Plant Co.,* 134 F. (2d) 94, 99 (C. C. A. 9). We submit that, contrary to petitioner's view, the *Germain Seed* case is not in conflict with the decision of the court below. The unique factual situation and the order modified in that case did not, in the view of the court, pose the issue here presented. In that case, employees had designated, and the employer had recognized, the directors of a company-dominated union as the exclusive

bargaining representatives. And the Board found, *inter alia,* that the Company had recognized the union (37 N. L. R. B. 1090, 1100) and ordered the Company to withdraw recognition from and disestablish it (37 N. L. R. B. 1090, 1107). The court held that since the employees had designated and the employer had recognized not the union, but only the directors, the Board erred in finding that the Company had recognized the union (134 F. (2d) at p. 99). Evidently assuming that the provision requiring the employer to withdraw recognition from the union was predicated upon this finding, which the court considered erroneous, the court, Judge Denman dissenting, declined (134 F. (2d) at p. 99) to enforce the section of the order containing the withdrawal and disestablishment requirements. In a concurring opinion, Judge Stephens stated that the court was unable to determine what type of order the Board would have entered if it had distinguished between recognition of the directors and recognition of the union, and suggested that the Board could easily enter a supplemental order if the Board thought a broader order than that enforced by the court was necessary to effectuate the policies of the Act (134 F. (2d) at pp. 99–100). Judge Denman, in his dissenting opinion, construed Judge Stephens' opinion to mean that if the Board should enter a supplemental order directing the disestablishment of the Association,

Judge Stephens would agree to enforce the order despite the fact that the Company had not recognized the union (134 F. (2d) at p. 101). Thus it is evident that the court did not pass upon the question of whether the Board had the power to order the disestablishment of a dominated union which had not been accorded recognition by the employer.

In the instant case, unlike the *Germain Seed* case, the Board found that petitioner had not recognized the Association and, instead of ordering the withdrawal of recognition, ordered petitioner to refrain from recognizing the Association. The order in the instant case did include a provision requiring petitioner completely to disestablish the Association. Such an order, based on the Board's finding (R. 117) that as a consequence of petitioner's interference and domination the Association "is incapable of representing the employees for the purpose of collective bargaining," constitutes, under Section 10 (c) of the National Labor Relations Act, an appropriate exercise of the Board's discretion to determine how the effect of unfair labor practices may be expunged. Cf. *Utah Copper Co.* v. *National Labor Relations Board,* 139 F. (2d) 788, 791 (C. C. A. 10), certiorari denied, April 24, 1944, *sub nom. Independent Association of Mill Workers* v. *National Labor Relations Board,* No. 802, October Term, 1943; *National Labor Relations*

Board v. *Freezer & Son*, 95 F. (2d) 840, 841–842 (C. C. A. 4). The decision below is clearly correct. Since no court has held that disestablishment is inappropriate because of the absence of formal recognition, we do not believe that the question is one that warrants review by this Court.

CONCLUSION

The decision below is correct in all respects and presents no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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